

No. 76321-6

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID T. McDONALD, et al.,

Petitioners,

v.

SECRETARY OF STATE SAM REED, et al.,

Respondents

DECEMBER 20TH DECLARATION OF NICK HANDY

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**Due to the fact that the current Attorney General is one of the candidates in the election being recounted, the above private counsel (instead of the Attorney General's office) is representing the Secretary of State in this matter.*

NICK HANDY declares:

1. Capacity. I am the Director of Elections in the Office of the Washington Secretary of State. In this capacity, I oversee the Elections Division of the Secretary of State's office. The Elections Division administers the state elections program under the direction of the Secretary of State consistent with applicable law. I am an attorney and have 30 years experience working in state and local government, including 14 years in the state Attorney General's Office. The Elections Division issues regulations of statewide application for elections in Washington state, including the regulations governing the original count and recount in elections such as the Governor's election at issue in this suit. As such, I have personal knowledge of and am competent to testify about the matters stated in this declaration.

2. The Elections Division of the Secretary of State's Office provides daily advice and guidance to Washington counties during an election. One key purpose of this advice is to promote a uniform and consistent interpretation of statewide laws, rules, and standards relating to the election.

3. As Director of Elections, I supervise professional elections staff with many years experience working in the elections division and who are familiar with state statutes, rules, and standards that have been implemented in Washington State regarding elections and relating to current and past recounts in Washington State.

4. I supervise and work closely with the following key elections professional staff: Deputy Elections Director John Pearson who has worked in elections for over 30 years; Assistant Elections Director Erika Aust, who has worked in elections for over 25 years; Certification and Training Manager Sheryl Moss who has worked in elections for 24 years; Assistant Director for Voter Services Pamela Floyd who has worked in elections for 12 years; and Voting Information Manager Paul Miller who has worked in elections for over 15 years.

5. During this recount, this group of key professional staff is working in close cooperation and consults hourly on issues and situations that arise in the counties. This group of state election advisors works closely and collectively to ensure that advice rendered by our office to the counties on the various laws, rules, standards and practices are as uniform and consistent as possible.

6. In the current recount for Governor, as in past statewide recounts, ballots have surfaced that were either not processed or were not properly processed in the original count or recount. In each of these situations, our office has advised the counties that RCW 29A.60.210, entitled "Recanvass—Generally", provides that "whenever a canvassing board finds that there is an apparent discrepancy or an inconsistency in the returns of a primary or election, the board may recanvass the ballots or voting devices in any precincts of the county." This provision is hereafter referred to as Section 210.

7. The purpose of Section 210 is to provide a "safety valve" for counties to correct errors, inconsistencies and discrepancies in election returns, primarily where the county has made an error or omission. Deadlines exist in statutes relating to submission of ballots and verification of signatures that bring closure to the correction of errors by voters. Section 210 is designed so that voters will not be disenfranchised due to errors by election officials.

8. Although the phrase "the returns of an election" or "election returns" does not have a specific statutory or administrative rule definition, the commonly accepted meaning of that phrase would include all ballots **returned** by voters (that the county determines are eligible to vote based on citizenship, age, residency, and other requirements), as well as other information, ballot counts, and election sub-totals necessary to produce the final results of an election and includes, but is not limited to, the actual final certified totals. This office has never interpreted the term "returns" to mean only the mathematical totals produced following an election.

9. The following are examples of situations in the current election and recount where our office was consulted for advice. In each of these situations, the canvassing board of the respective counties made a discretionary decision under Section 210 regarding whether an "inconsistency" or "discrepancy" has occurred "in the returns" of the election.

a. **Snohomish County.** During the machine recount, Snohomish County located 224 ballots in a mail tray buried in the middle of a large stack of empty mail trays in a secured ballot storage area. These ballots had not been counted in the original count. Snohomish County presented these ballots in open public session to the canvassing board. The canvassing board reviewed all circumstances relating to these ballots and determined under Section 210 to include them in the machine recount even though they had not been tabulated in the original count.

b. **Kittitas County.** During the machine recount, Kittitas County located 34 ballots that had not been included in the original count. These ballots had been presented to the canvassing board in the original count and had been approved for tabulation by the canvassing board. Following canvassing board approval of these ballots, an elections worker set the ballots aside and as a result the ballots were not included in the original count. Upon discovery, these ballots were presented again to the canvassing board. Upon review of all circumstances relating to these ballots, the canvassing board under Section 210 determined to include these 34 ballots in the machine recount.

c. **Whatcom County.** Whatcom County discovered 7 provisional ballots that had not been included in either the original count or the machine recount. After signature approval and the envelopes had been opened, the ballots were inadvertently placed

in the "empty envelope" stack and not discovered until after certification of the machine recount. Upon discovery prior to the manual recount, these ballots were presented to the canvassing board. Upon review of all circumstances relating to these ballots, the canvassing board under Section 210 determined to include these 7 provisional ballots in the manual recount.

d. **Chelan County.** Chelan County received two ballots from Nancy Johnson at the same address. Chelan County disqualified the second ballot as a duplicate in the original count. Chelan County was later presented information that two people named Nancy Johnson resided in the Leavenworth area. Upon presentation of this new information and upon review of all circumstances relating to this ballot, the canvassing board under Section 210 determined to include this ballot in the manual recount.

e. **Pierce County.** Pierce County found one ballot lodged in the bottom of a voting machine during the manual recount that had not been counted in the original count or the machine recount. Upon review of all circumstances relating to this ballot, the canvassing board under Section 210 determined to include this ballot in the manual recount.

f. **King County (Example One).** During the manual recount, King County discovered that approximately 730 ballots had been rejected in the original count as "signature mismatch"

when county election workers were unable to locate the signature of these voters on the voter registration database. King County determined that the inability of election workers to locate the signature was due to error by King County. These ballots were presented to the canvassing board pursuant to Section 210. Pursuant to Section 210, the canvassing board directed staff to gather more information relating to these ballots and to present this information back to the canvassing board before a final determination would be made as to whether the ballots would be counted.

g. **King County (Example Two).** During the manual recount, King County election workers found 22 absentee ballots in ballot boxes located in poll sites. These absentee ballots had been delivered by voters to the polling place and were placed in a separate ballot box at the polling site. Election workers inadvertently failed to collect these ballots. Upon presentation of these ballots to the canvassing board under Section 210, the canvassing board directed staff to gather more information relating to the security of these ballots and to bring this information back to the canvassing board for a final determination as to whether these ballots would be counted.

h. **Whatcom County.** Whatcom County presented two provisional ballots to the canvassing board for review under Section 210. In one instance, a Whatcom County voter's

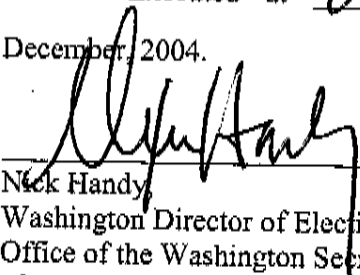
provisional ballot was mistakenly forwarded to King County and was not returned to Whatcom County when it was discovered that the voter was not registered in King County. In the second instance, a Whatcom County voter voted in Skagit County but the provisional ballot was not forwarded to Whatcom County. Neither of these ballots was counted in the original count or the machine recount. In both instances, the provisional ballots were ultimately forwarded to Whatcom County. Upon review of all circumstances relating to these two ballots, the canvassing board under Section 210 determined to include both ballots in the manual recount.

i. **Not a Complete List.** These examples are provided for illustrative purposes. These examples are not necessarily a complete listing of instances in which Section 210 was used in this election by canvassing boards making discretionary decisions to include or exclude ballots based upon findings of "inconsistency" or "discrepancy" in the "returns" of the election.

10. The Pierce County Superior Court's ruling on Friday, December 17, 2004 enjoining the King County Canvassing Board from making a discretionary ruling under Section 210 results in an inconsistent application of Section 210 in this election. In all other instances for which the Elections Division is aware in this election, Section 210 was administered to allow the canvassing boards to make discretionary

determinations about discrepancies or inconsistencies in the returns of the election.

11. Closing. I declare under penalty of perjury that the foregoing is true and correct. Executed at Olympia, Washington, this 20th day of December, 2004.



Nick Handy,
Washington Director of Elections,
Office of the Washington Secretary
of State.